

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROSS HUNTER, ) Civil No. 10cv724 L (WVG)  
Plaintiff, ) **ORDER GRANTING *EX PARTE***  
v. ) **MOTION TO CONTINUE [doc. #5]**  
OASIS FINANCIAL SOLUTIONS, LLC, )  
Defendant. )  
\_\_\_\_\_  
)

Plaintiff filed the above-captioned case on April 6, 2010. Because service of process was not effectuated by August 4, 2010, plaintiff filed an *ex parte* motion to continue the deadline for service of process on August 8, 2010.

Federal Rule of Civil Procedure 4(m) requires a plaintiff to effectuate service of process on defendants within 120 days after the filing of the complaint. If plaintiff fails to serve the Complaint within the time provided, Rule 4(m) further provides the court "shall dismiss the action without prejudice as to that defendant or direct that serve be effected within a specified period of time." Thus, Rule 4(m) allows courts to provide additional time for service, "even if good cause is not shown." Notes of the Advisory Committee on 1993 Amendments to rule 4(m). The Advisory Committee Notes specifically state that "[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service." *Id.* (citing to *Ditkof v. Owens-Illinois, Inc.*,

1 114 F.R.D. 104 (E.D. Mich. 1987)).

2 Federal Rule of Civil Procedure 6(b) grants district courts discretion to enlarge time  
 3 periods set by the rules. This is so even when the request is made after the expiration of the time  
 4 period to be enlarged, provided the delay was caused by excusable neglect. FED. R. CIV. P.  
 5 6(b)(2).

6 "Excusable neglect" covers negligence on the part of counsel. *See Pincay v. Andrews*,  
 7 389 F.3d 853, 856 (9th Cir. 2004) (*en banc*). The determination of whether neglect is excusable  
 8 is an equitable one that depends on at least four factors:

9 (1) the danger of prejudice to the non-moving party, (2) the length of delay and its  
 10 potential impact on judicial proceedings, (3) the reason for the delay, including whether it  
 11 was within the reasonable control of the movant, and (4) whether the moving party's  
 12 conduct was in good faith.

13 *Pincay*, 389 F.3d at 855 (citing *Pioneer Investment Services Company v. Brunswick Associates*,  
 14 507 U.S. 380, 395 (1993)). The district court's discretion in this regard is broad. *See Pincay*,  
 15 389 F.3d at 859.

16 The Supreme Court in *Pioneer* established a balancing test to determine whether an  
 17 untimely filing is due to excusable neglect. *Pioneer*, 507 U.S. at 395; *see also Pincay*, 389 F.3d  
 18 at 855. The focus of the inquiry in *Pioneer* was whether the reason for the delay, an attorney's  
 19 egregious and clearly negligent misreading of an unambiguous rule, could constitute excusable  
 20 neglect. *Pioneer*, 507 U.S. at 394. In the present case, as in *Pincay*, this question is answered  
 21 "within the context of a particular case," including the evaluation of factors such as "whether the  
 22 lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty  
 23 mistakes, the quality of representation of the lawyers . . . , and the likelihood of injustice" if  
 24 relief is denied. *Id.* at 859.

25 Here plaintiff fails to discuss any of the factors that the Court should consider in  
 26 determining his request for an extension of time. Instead, plaintiff's counsel merely states that  
 27 the process server she chose failed to serve the complaint notwithstanding her repeated contacts  
 28 with him. For this reason alone, the Court could deny plaintiff's motion. It is counsel's  
 obligation to argue the merits of the motion and the relief sought. Nevertheless, the Court finds

1 there is no prejudice to defendant if a brief extension of time to serve the summons and  
 2 complaint is allowed. Further, the time between when service was to have been effectuated and  
 3 the request for an extension of time to serve is unremarkable and brief delay will not interfere  
 4 with the case. There is nothing to suggest that the failure to timely effectuate service was in bad  
 5 faith or done with the intent to subject defendant to unfair or unreasonable tactics.

6 Finally, the reason for the delay in service of process was within the reasonable control of  
 7 the movant, *i.e.*, the failure of counsel to ensure that the process server acted promptly.  
 8 “[W]hether neglect is ‘excusable’ is the conclusion one reaches after considering the pertinent  
 9 factors, not an independent element with moral content.” *Pincay*, 389 F.3d at 860 (Berzon, J.,  
 10 concurring). As Judge Berzon noted in *Pincay*, “*Pioneer* thus indicates that a district court may  
 11 find neglect ‘excusable’ if it is caught quickly, hurts no one, and is a real mistake, rather than  
 12 one feigned for some tactical reason – even if no decent lawyer would have made that error.” *Id.*

13 Having considered the *ex parte* motion and the relevant factors, the Court finds and  
 14 concludes that the failure to timely effectuate service of process was based on an error  
 15 occasioned by faulty administrative practice on the part of counsel; plaintiff acted promptly to  
 16 rectify the error; there is no prejudice to defendant; and plaintiff’s error was real and not made  
 17 for some tactical reason.

18 Based on the foregoing, plaintiff’s *ex parte* motion to continue the deadline for service of  
 19 process is **GRANTED**. Plaintiff shall have until September 3, 2010 in which to effectuate  
 20 service of process. No further extensions of time to serve defendant shall be granted.

21 **IT IS SO ORDERED.**

22 DATED: August 23, 2010

23   
 24 M. James Lorenz  
 United States District Court Judge

25 COPY TO:

26 HON. WILLIAM V. GALLO  
 UNITED STATES MAGISTRATE JUDGE

27  
 28 ALL PARTIES/COUNSEL

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